FULL BENCH

Before Mehar Singh, C. J., D. K. Mahajan and P. C. Pandit, JJ.

JOGINDER SINGH,—*Appellant*

versus

SHMT. PUSHPA,—*Respondent*

L.P.A. 189 of 1964

August 20th, 1968

Hindu Marriage Act—(XXV of 1955)—Ss. 9 and 13—Consent decree for conjugal rights—Whether can be validly passed—Such decree—Whether a nullity—Decree not challenged—Whether can form the basis of divorce proceedings.

Held, by majority (Mahajan and Pandit, JJ.) (1) That section 9 of the Hindu Marriage Act empowers the District Judge to entertain and decide an application for restitution of conjugal rights in accordance with the provisions of the Act. The Court of the District Judge when properly seized of the matter has the jurisdiction to decide that matter and can pass a decree with consent unless the passing of such a decree is forbidden by law. Section 9 of the Act requires that the Court must be satisfied of the truth of the statements made in such petitions and that there is no legal bar to the grant of such an application. The legal bars in the Act are to be found in section 23, namely, that the petitioner is not, in any way, taking advantage of his or her own wrong or disability for the purposes of the relief sought; or that the petitioner has not, in any manner, been accessory to or connived at or condoned the act or acts complained of; or where the ground of petition is cruelty, the petitioner is not presented or prosecuted in collusion with the respondent; or there has been unnecessary and improper delay in instituting proceedings. Section 23 also provides that before granting the relief prayed for, it shall be the duty of the Court in the first instance in every case, where it is possible so to do consistent with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Besides these provisions, there is no specific provision in the Hindu Marriage Act which prohibits the passing of a consent-decree or declares that if such a decree is passed, it will be null and void. Therefore it cannot be said as a matter of law that District Court cannot pass a consent decree under the Act. On principle also there is no reason why a consent-decree cannot be passed. The ojbect of such a decree is to bring the parties together. That is why, it is provided in the Statute that a Court should

make an effort at reconciliation. The mere fact, that the disobedience of such a decree furnishes a ground for divorce, is wholly besides the point. The parties may be genuinely willing to live together and obey the decree at the time when the consent-decree was passed and, later on, circumstances may arise which lead to their breaking apart with the result that the disobedience of the decree follows. But that will not mean that the decree was obtained merely for the purpose of getting a divorce or merely for the purpose of fulfilling a formality. In each case, it has to be determined whether the consent is a genuine consent-decree or is merely a collusive consent-decree. If it is a collusive consent-decree, the Courts will not take it into consideration for purposes of a petition for divorce. But otherwise, there is nothing which stands in the way of the same furnishing a ground for divorce. As a matter of law, it cannot be ruled that merely because the decree under section 9 is a consent-decree, therefore, it necessarily is a collusive decree.

(2) *Held,* that a consent decree under section 9 of the Act cannot be held to be nullity. The District Court has jurisdiction to entertain and decide an application under this section. Since the jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. The District Court dealing with the application may do something which the law does not permit. The decree has to be vacated in accordance with law. It cannot be ignored. Only those decrees which are wholly without jurisdiction or which the law declares null and void can be ignored.

(3) *Held,* that if a Court decree for restitution of conjugal rights under section 9 of the Act is passed, it will not be a nullity. If it is not challenged in appeal or by way of other remedy available under the law and becomes final, it cannot be ignored and can form the basis of divorce proceedings under section 13 of the Act.

Case referred by Hon'ble the Chief Justice Mr. Mehar Singh and the Hon'ble Mr. Justice P. C. Pandit on 14th April, 1967 to a Larger Bench for decision of an important question of law involved in this case. The Full Bench consisting of Hon'ble the Chief Justice Mr. Mehar Singh, the Hon'ble Mr. Justice D. K. Mahajan, and the Hon'ble Mr. Justice P. C. Pandit decided the case finally on 20th of August, 1968.

Letters Patent Appeal under Clause 10 *of the Letters Patent from the decree of the Hon'ble Mr. Justice Jindra Lal, dated the 15th day of April,* 1964, *passed in F.A.O. 55(M) of* 1963.

H. L. Sibal, Senior Advocate, with H. R. Aggarwal, J. L. Gupta, H. L. Sarin, Bahal Singh Malik and H. S. Awasthy, Advocates, for the Appellant.

S. S. Sandhawalia and A. S. Bains, Advocates, for the Respondent.

ORDER OF FULL BENCH

While this reference has been argued for the last few days by the learned counsel on both sides, circumstances have been brought to our notice that this is a case which will more appropriately be disposed of if the whole of the case is before this Bench and not merely the two questions which have been referred by the Division Bench to this Bench. Myself and my learned brother, Pandit J., were in the Division Bench when we made the reference, and we are agreed that this is a proper case which should be heard as a whole on all questions arising, whether of fact or law, by this Bench, and Mahajan J., also agrees with this opinion of ours. So that all the three Judges are agreed on this and the order then is that this case will now be heard by this Bench both on facts as well as on all questions of law, including the two questions already in the reference, arising in the particular facts of this case. The counsel will now proceed to arguments on this basis.

JUDGMENT OF FULL BENCH

MEHAR SINGH, C.J.—This is an appeal under clause 10 of the Letters Patent from the judgment and decree, dated April 15, 1964, of a learned Single Judge. It arises out of a petition by the husband, Joginder Singh appellant, under section 13 (1A)(ii) of the Hindu Marriage Act, 1955 (Act 25 of 1955), hereinafter to be referred as 'the Act', for dissolution of marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights between the parties, that is to say, the appellant and his wife, Pushpa respondent, for a period of two years or upwards after the passing of the decree for restitution of conjugal rights in a proceeding to which they were parties.

The appellant made a petition under section 9(1) of the Act against the respondent for a decree for restitution of conjugal rights on the allegation that she had, without reasonable excuse, withdrawn from his society. The parties were married on June 25, 1958, and lived together only up to October of that year at the village of the appellant, whereafter the respondent left the house of the appellant. It was in January, 1960, that the appellant made the petition under section 9(1) of the Act. The parties appeared before the trial Court on May 18, 1960. The appellant made this statement in Court—"I want to keep the respondent (wife) with me. I will never maltreat

her in future. But it should not be taken that I have maltreated her. I am ready to settle her happily after forgetting all the previous matters. I promise before the Court that I will not maltreat her in future." On that the respondent made this statement—"It is stated that the respondent (wife) is prepared to go along with the petitioner (husband). The petitioner had turned her out of the house. I am ready to stay with the petitioner forgetting all the previous matters." The trial Court then immediately proceeded to give the judgment, the operative part of which reads—"At the time of framing of the issues, the petitioner and the respondent made a statement before the Court that they wanted to live together. The petitioner assured the Court as well as the respondent that he shall not maltreat the respondent. Both parties made a statement that they shall try to forget the past though they were not agreed as to whether the petitioner had been treating the respondent with cruelty or not. As such in accordance with the statements of the parties the petition for restitution of conjugal rights is accepted. No order is made as to costs as the same were not pressed before me on behalf of the petitioner." A decree in the terms of the judgment followed, of which the copy is Exhibit A/4. It reads—"This suit (petition) coming on this day (May 18, 1960), for final disposal before me (Shri Manohar Lal Mirchia, B.A., LL.B., P.C.S., Subordinate Judge 1st Class, Hoshiarpur) in the presence of Shri Brahma Nand Advocate, for the petitioner and Shri Ajit Singh Bains Advocate, for the defendant (respondent), it is ordered that in accordance with the statements of the parties, the petitioner is granted a decree for restitution of conjugal rights. No order is made as to costs."

An application, dated May 30, 1960, to execute the decree was made by the appellant in the executing Court on June 1, 1960 but it was returned on account of some formal defect and was actually received back for hearing on June 3, 1960, on which date order was made for notice of it to the respondent. Now, the file of the execution application has not on it any process which shows service of the notice on the respondent. But on July 6, 1960, when the application came up for hearing before the Court, Shri Ajit Singh Bains, Advocate for the respondent made the statement that "Smt. Pushpa Devi respondent is prepared to go with the decree-holder (appellant) at the very moment. The decree-holder (appellant) may take her with him." This statement is signed by Shri Ajit Singh Bains. This is followed by a statement by Shri Brahma Nand, Advocate, for the appellant that the respondent's brother

Karam Singh should take the respondent to the house of the appellant and leave her there, explaining that if the appellant himself took the respondent with him, there was apprehension that the relations of the parties might become strained. He then added that the respondent alone could go with the decree-holder. The statement is signed by him. The executing Court thereupon directed the respondent to accompany the appellant saying that the latter was prepared to take her along with him. On that Shri Brahma Nand Advocate, for the appellant made a statement that no further proceedings were needed in the execution application, and the executing Court then proceeded to order the dismissal of the execution application, again saying that the parties may go together. This is obviously, dated July 6, 1960. There is then an application of the same date, that is to say, July 6, 1960, in the name of the appellant, but signed by Shri Brahma Nand Advocate. Its contents are so worded that the meaning is not immediately clear, but it appears to be an application made on behalf of the appellant in reply to some application by the respondent, and it was said on the side of the appellant that the respondent was merely making a pretence and she was not, in good faith, willing to go with the appellant. Although this application is on the execution file, but there is no order of the Court on it. There is, however, on the back of it a faint round marking of the seal of what appears to be the seal of the Court. When the parties appeared as witness during the hearing of the petition under section 13 of the Act, no question about this application was put to the appellant. On the next day, that is to say, on July, 1960, the appellant made another application in the executing Court signed by himself as also by his Advocate, Shri Brahma Nand, saying that although the respondent had agreed on the previous day to go with him and, therefore, he had had the execution application dismissed, but; when outside the Court, she refused to accompany him. The prayer was that the application be made a part of the execution file. On July 9, 1960, the executing Court proceeded to make the order—"No action can be taken, file." This was the end of the first execution application by the appellant to execute the decree in his favour for restitution of conjugal rights against the respondent.

The second application to execute the decree was made by the appellant on October 25—27, 1961. On notice of this application, the respondent appeared in Court on June 9, 1962. and stated clearly that she was not prepared to go with the appellant and that the question of her going with him did not arise because he had

previously insulted her. So she refused to go along with the appellant. Copy of this second execution application is Exhibit A/1, and that of the statement of the respondent is Exhibit A/3.

In the meantime the appellant had on May 25, 1962, made the petition under section 13 of the Act seeking a decree for dissolution of marriage by way of divorce from the respondent. The case of the appellant was simple that in spite of the decree for restitution of conjugal rights made on May 18, 1960, and in spite of his having taken out execution of that decree the respondent had failed to comply with the decree for a period of more than two years, and had rather started proceedings against him under section 488 of the Code of Criminal Procedure for maintenance. In her defence the respondent admitted the previous proceedings under section 9 of the Act and further stated that on the assurance of the father of the appellant, a retired Sub-Divisional Officer, and his brother, a Subordinate Judge, she agreed to live with the appellant. The written reply then goes on to say—"As soon as the respondent came out of the Court after making her statement and asked the petitioner (appellant) to take her along with him, the petitioner refused there and then. It was brought to the notice of the Court of the Subordinate Judge in whose Court the petition was pending. Thereafter the petitioner came along with the respondent and lived there till August, 1960, and finally left the house on the pretext of meeting his parents and never returned." At the trial the respondent clarified this by saying that after the parties left the Court on May 18, 1960, the appellant accompanied her and her brother Karam Singh to the house of the last-named in Model House locality in Jullundur where he stayed with them for two months and then deserted her. The appellant filed a replication in which he gave a complete denial to the allegations of the respondent as above in her written reply and said that "the respondent never resided with the petitioner (appellant) at Jullundur or any other place, after the passing of that decree. The allegations of residing together at Jullundur are false and fantastic, which were set up by the respondent to confer jurisdiction on the criminal courts at Jullundur trying her application under section 488, Criminal Procedure Code. There was no question of residing together at Jullundur, as the petitioner never had any permanent or even temporary abode at that place." The parties led evidence, but the learned District Judge in his judgment of June 6, 1963, discredited the version of the respondent and her witnesses that after the

decree for restitution of conjugal rights on May 18, 1960, the appellant accompanied the respondent and her brother to the house of the last-named at Jullundur and, staying there for two months, left the respondent of his own. The learned Judge believed the appellant that he had taken out the first execution application of which the respondent had knowledge and even though at that time she had agreed in Court, a second time, to go along with the appellant and live with him, she never did so and parted company with the appellant immediately as they came out of the court-room. At the time of the second execution application she made an unabashed statement that she was not in any event, prepared to go back to the appellant. The learned Judge, therefore, accepted the petition of the appellant and granted a decree of divorce in his favour and against the respondent. In appeal the learned Single Judge believed, excepting one, the witnesses of the respondent and, coming to the conclusion that in the first execution application of the appellant no notice was really served on the respondent nor did she ever appear in the Court, accepted the version of the respondent and her brother Karam Singh, that after the Court passed the decree for restitution of conjugal rights, the parties accompanied Karam Singh, brother of the respondent, to his house in Model House locality in Jullundur, where the appellant stayed with the respondent for a period of about two months and then left her on a pretence, never returning to her but, instead, petitioning for a decree of divorce from her. So the learned Judge reversed the decree of the trial Court and dismissed the petition of the appellant on April 15, 1964.

Th appellant's appeal under clause 10 of the Letters Patent from the decree of the learned Single Judge first came for hearing before my learned brother, Pandit J., and myself. During the hearing of the appeal, our attention was drawn to the observation of the learned Single Judge that a decree for restitution of conjugal rights was granted by consent. I have a considerable doubt whether this could be done'. On the side obviously of the respondent the contention was that a consent decree for restitution of conjugal rights is not a valid and an enforceable decree. We did not at that time decide the question whether the decree for restitution of conjugal rights between the parties made on May 18, 1960, was or was not a consent decree, but on April 14; 1967; we referred these two questions to a larger Bench—

(1) Can a consent decree for restitution of conjugal rights be passed under section 9 of Act 25 of 1955 and if passed, is

such a decree a valid decree or is such a decree not a nullity?

(2) If a consent decree for restitution of conjugal rights is made under section 9 of Act 25 of 1955, whether it is valid or a nullity or not, if it is not challenged in appeal or by way of other remedy available under the statute and becomes final, can its validity be questioned or can it be said to be a nullity in proceedings for divorce under section 13(1) (ix) of Act 25 of 1955 [since omitted by the Hindu Marriage (Amendment) Act, 1964 (Act 44 of 1964), which inserted section 13(1A) in the Act]?

This is how this case has come before the present Bench. In the arguments before this Bench a further question was raised on the side of the appellant that the decree for restitution of conjugal rights between the present parties is not really a consent decree, and, if this is correct, the above two questions obviously would not arise in this particular case. It is in the wake of this contention on the side of the appellant that the two referring Judges (Pandit J. and myself) were agreeable that the whole case should be heard by this Bench, and, as Mahajan J. also agreed to this course, so we by an order of May 17, 1968, had the whole case laid before us for final decision, which means that not only the two questions referred to the larger Bench but also the petition under section 13(1A) (ii) of the Act as such, even on merits, have been before us for final disposal. So arguments have been heared on all the aspects of the case and not merely confined to the two questions as above.

The first matter for consideration is whether there has or has not been compliance of the decree for restitution of conjugal rights by the respondent? Admittedly, the decree was passed by the Court on May 18, 1960. Some twelve to fifteen days after, the appellant made the first execution application in Court for execution of that decree. The actual date of its presentation was June 1, though it was accepted on June 3, 1960. Shri Ajit Singh Bains Advocate, has been the counsel for the respondent throughout. He has been her consel in the proceedings under section 9, in the proceedigs of the two execution applications, and in the proceedings under section 13 of the Act. He has represented her before the learned Single Judge and has also been appearing on her side in

this appeal. No doubt, as pointed out, the file of the first execution application has no copy of the process returned on it showing service of notice of that application on the respondent, but unmistakably on July 6, 1960, Shri Ajit Singh Bains, made a statement for and on behalf of the respondent that she was ready to go with the appellant at the very moment and that could only happen in the presence of the respondent, for, if she was not present there, her counsel could not have said that she was at the particular moment ready to go with the appellant. There is then the statement of the counsel for the appellant which supports this, for in the end he came to make the statement that the respondent could alone go with the appellant to his house. There is the order of the trial Court saying definitely that the judgment-debtor (respondent) was prepared to accompany the decree-holder (appellant) and, in his turn, the appellant was prepared to take her along with him. It was after this order by the executing Court that the counsel for the appellant had the execution application dismissed. As stated, Shri Ajit Singh Bains was counsel for the respondent in the proceedings under section 9 of the Act and his name appears in the decree, copy Exhibit A/4. So he could not have made a statement on July 6, 1960, that the respondent was immediately prepared to accompany the appellant if the former was not present there. Similarly, if that was not so, the counsel for the appellant could not have said that the respondent alone could accompany the appellant, thereby dropping that her brother should also be there. The Court would not have noted, as it in fact did, that the respondent was prepared to go with the appellant and the latter was prepared to take her with him. The whole proceedings of July 6, 1960, without a mistake can only have meaning if both the respondent and the appellant were present there. Otherwise it will have to be assumed that Shri Ajit Singh Bains, Advocate for the respondent, and Shri Brahma Nand, Advocate for the appellant, and the Judge presiding over the executing Court, all three, either conspired into preparing this record falsely in the absence of the respondent, or at least the presiding officer of the executing Court was so negligent that he did not notice such a conspiratorial agreement between the counsel for the parties. There is absolutely nothing in support of any such fantastic suggestion, and no suggestion has really been made. That being so, the proceedings of July 6, 1960, in the first execution application prove beyond question that within twelve to fifteen days of the date of the decree for restitution of conjugal rights the appellant was obliged again to seek the assistance of the

Court in the shape of an endeavour to put up the decree into execution against the respondent. And within the next about two and a half months the respondent appeared in Court and again agreed to go with the appellant, and obviously live with him as wife. That was the reason why the first execution application of the apellant was dismissed. The miscellaneous application on behalf of the appellant, signed by his Advocate, Shri Brahma Nand, dated July 6, 1960, as has already been pointed out has not been written in clear language to say what was intended to be conveyed. However, it appears to be an application on the side of the appellant in reply to some application made by the respondent, but no such application by the respondent is available on the file of the execution application. There is no endorsement by any official of the Court on this application, but, as already pointed out, there is a faint mark of the Court seal at the back of it. This application has been taken by the learned Single Judge to be not a genuine application and suspecting that it may have been introduced in the file at a later stage otherwise it would have had the endorsement of some official of the Court, the learned Judge came to the conclusion that it was an attempt on the part of the appellant to create evidence in his favour on July 6, 1960, that the respondent was refraining to live with him in spite of the decree for restitution of conjugal rights against her. Unfortunately, so it appears, the original file of the first execution application was not before the learned Single Judge and he had not, therefore, the opportunity to see the proceedings of that Court on that day, proceedings made up of the statements of the counsel for the parties and the orders of the executing Court. Having once come to the conclusion that the miscellaneous application of July 6, 1960, already referred to above, was an attempt by the appellant to create evidence in his favour, the learned Judge proceeded to reject the second application of the next day, that is to say, July 7, 1960, by the appellant, signed by his counsel also, pointing out that although on the day before the respondent had agreed to go with the appellant, but once the parties were out of the court-room, the respondent refused to go with the appellant and did not actually accompany him. The learned Judge was of the opinion that this application, though it has the court-fee stamp on it and all the endorsements of the Court officials are to be found on the back of it, including the order of the Court, was also not a genuine application, but was an attempt on the part of the appellant to create evidence against the respondent of her having refused compliance of the decree. The learned Judge

pointed out that no prayer was made in this application except that it be filed with the previous execution application already dismissed. It has already been pointed out that the miscellaneous application of July 6, 1960, from the side of the appellant, signed by his counsel, was never put to the appellant when he appeared in the witness-box to elicit from him the circumstances in which it came to have been made. Not only this it is in the execution file correctly page-marked, so that if it is a document which has been added into the file that must have been done immediately so as to provide a correct marking of its pages. The application of the next day, which bears the court-fee stamp as also the endorsements of the court officials, is also there on the file. If this was the only material, as it appears to have been before the learned Single Judge, something may be said in support of the conclusion of the learned Judge, but when it is taken into consideration along with the proceedings in the first execution application on July 6, 1960, not a shadow of doubt can possibly be left that on that date in that execution application, both the parties with their counsel were present, the respondent agreed to go and live with the appellant, and the last-named agreed to take her with him. It is the proceedings of that day that were not before the learned Single Judge and had those proceedings been before the learned Single Judge, his conclusion in all probability would have been entirely the other way. During the hearing of this case Shri Ajit Singh Bains, when asked, of course accepted that he represented the respondent throughout, including in the first execution application, but he said that he did not remember whether the respondent was actually present in person on July 6, 1960, in Court. He, however, did not say that she was not so present. The proceedings clearly show that she was so present. The learned counsel on her behalf pressed that her own statement should have been recorded. It is true that her own statement was not recorded by the executing Court, but the proceedings could not have taken the shape in which the same are unless she was herself present. Her counsel, Shri Ajit Singh Bains, could not possibly have made a statement that she was ready to go along with the appellant at the very moment the statement was being made, for that could only happen if she in fact was present there. As stated, the same is the unquestionable conclusion from the statement of the counsel for the appellant and the orders of the executing Court on that day. The process whereby notice of the execution application was given to her has not been found on the file, but such omission from the record can never be taken to lead

to the inference that there was no issue of notice and none was served on the respondent because it is common experience of anybody dealing in Courts that, in a number of cases, when the process in fact returns, it does not find place on the record on account of the sheer negligence of the ministerial staff in not placing the same on the proper file. Once this conclusion is reached, supported as it is by the record of the court's proceedings on July 6, 1960, that on that date the respondent appeared in Court in the first execution application by the appellant, she repeated her pretence to go along with the appellant, in the same way as she had done at the time of making of the decree for restitution of conjugal rights some two months earlier, but immediately on coming out of the court-room she again refused to go with the appellant, the version given by her in Court and by her witnesses that after the decree for restitution of conjugal rights on May 18, 1960, the appellant went along with her and her brother to Jullundur to stay there for two months in the house of her brother, must apparently and immediately be rejected as a false statement. Within about twelve to fifteen days of the date of the decree the appellant was already approaching the Court for execution of the decree and within about two months of the decree the respondent was for the second time making her statement in Court that she was prepared to go along with the appellant. The parties could not have been doing this while living together amicably in the house of the brother of the respondent in the Model House locality in Jullundur. So the learned District Judge was justified in dismissing such version of the respondent as apparently untrue.

Apart from herself and her brother Karam Singh, the respondent produced three witnesses in support of her version that for two months from May 18, 1960, the appellant lived with her in the house of her brother in Model House locality of Jullundur. One witness was not relied upon on her side either before the learned District Judge or before the learned Single Judge, and his name is Kartar Singh. The remaining two witnesses, namely, Lekhraj and Balram, were disbelieved by the learned trial Judge but their evidence has been accepted by the learned Single Judge. The two witnesses belong to the Model House locality in Jullundur. They admit that they were casual acquaintances of the respondent's brother, but were not on visiting terms with him. There was no special occasion why the appellant should have been introduced to them, but it was said that he was so introduced to either on chance meetings. Besides, the

witnesses made discrepant statements not only with regard to the time when the appellant started living with the respondent in the respondent's brother's house in the Model House locality but also with regard to the duration of his stay, and further with regard to the months during which he stayed. The learned District Judge took into consideration all these matters and also the further matter that the witnesses were not summoned and one of them was even prepared to say that he was not going to have any expenses from the brother of the respondent for having appeared as a witness. These reasons, however, did not impress the learned Single Judge. This appears to me to be a case in which the observations of their Lordships in *Sarju Pershad Ramdeo Sahu* v. *Jwaleshwari Pratap Narain Singh* (1), referred to by the learned Single Judge in his judgment, aptly apply that when there is conflict of oral testimony of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact. Here in the present case there are no special reasons with regard to any of those two witnesses which did not come to the notice of the learned trial Judge and on account of which his opinion with regard to their creditability may be discarded. Nor is there any measure of improbability which displaces the opinion of the learned trial Judge as to the creditability of those witnesses. It may be that the learned Single Judge was impressed by the conclusion he had reached that the appellant had endeavoured to create evidence in the first execution application showing refusal of the respondent to comply with the decree for restitution of conjugal rights and so he reached the further conclusion that the witnsses for the respondent were rather credible. But it has been shown from the proceedings in the first execution application file that no such attempt was made by the appellant and that the fact of the matter is that those proceedings discredit the version of the respondent and also the evidence of her witnesses. There was, in my opinion, no special aspect which had escaped the consideration of the learned trial Judge that could be the basis for interference with his conclusion as to

(1) A.I.R. 1951 S.C. 120.

creditability of the evidence of those two witnesses. Those two witnesses, in the circumstances, are not reliable witnesses and in this respect the conclusion of the learned trial Judge has to be supported. The only other two witnesses on the side of the respondent are the respondent herself and her brother Karam Singh. The learned trial Judge was right in describing both the witnesses as highly interested. Apart from this, the respondent has completely denied that she had any knowledge of any proceedings in the first execution application or that she ever appeared in Court in that application on July 6, 1960. In other words, she has almost gone back on the statement of her own counsel, which statement, as has already been said proves conclusively that it could not have been made unless the respondent was herself present in Court. So her testimony and that of her brother cannot be accepted either.

When the appellant made the second execution application and after notice the respondent appeared in Court, she then never said that there was no question of executing the decree for restitution of conjugal rights because she had already complied with the same immediately after it was passed on May 18, 1960, by having lived with the appellant for a period of two months, until he himself deserted her, in the house of her brother Karam Singh, in Model House locality of Jullundur. Surely this was a complete and an absolute answer to that second execution application. She never said any such thing. The learned Single Judge observed that that is a cryptic statement, but there is nothing to show that anything stopped the respondent from making any more of her statement. She has not in her own testimony said that she did not get an opportunity to give a proper reply to that application at the time she made her statement. In her statement she defiantly said that she would never go to the appellant and the question could not arise. So that this version of her's in the written reply to the appellant's petition under section 13 of the Act is clearly an afterthought though perhaps not immediately before filing that reply, because it might well have been an idea that struck her much earlier so as to make a claim for maintenance allowance against the appellant under section 488 of the Code of Criminal Procedure with the obvious object of showing that the Jullundur Court had the jurisdiction to entertain an application with regard to the same. So that this omission on her part to take the stand even in the second execution application supports the conclusion already arrived at that this version of her's is not true.

Neither she nor her brother has told the truth when supporting this version. The appellant has clearly and in so many words denied having ever lived in the house of the brother of the respondent at Jullundur in Model House locality, his conduct in filing the first execution application and then the second speaks in support of him and against the story of the respondent and her brother.

The consequence then is that the conclusion of the learned trial Judge, that the version of the respondent and her brother that immediately after the decree on May 18, 1960, the appellant accompanied them to the house of the respondent's brother at Jullundur is not true is to be supported, and in this respect that version of the respondent and her brother is disbelieved. There was non-compliance of the decree for restitution of conjugal rights by the respondent from the very beginning. She having made statement in Court, immediately refused to accompany the appellant, coming out of it, on the very day of May 18, 1960, then again she repeated the very same conduct in July 6, 1960, and ultimately she refused to go and live with the appellant in her third statement in the second execution application. She therefore, persistently refused to comply with the decree. On this conclusion obviously, if there was no other matter for consideration in this case, the decree of the learned Single Judge has to be reversed restoring that of the learned trial Judge.

There is, however, an argument on the side of the respondent that the decree for restitution of conjugal rights in this case, being a consent decree, is a nullity and its non-compliance cannot be a ground for divorce. The learned counsel has relied in support of this argument on some English as well as Indian cases. *In Harriman* v. *Harriman* (2), at page 131, Cozens-Hardy M. R. observed—"..... the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied", and then Farwell L. J. at page 144—"No consent or admission can justify a decree, it is the duty of the Court to protect the public by seeing that divorce is obtained only on proper evidence, and so fully is the interest of the public recognized

(2) 1909 P.D. 123.

in the matter that by the Act of 1860 (23 and 24 Vict. c. 144), section 7, any person may intervene between decree nisi and decree absolute to show cause why the decree should not be made absolute on the ground of collusion or the suppression of facts". Again in *Gayer* v. *Gayer* (3) at page 67, Lord Cozens-Hardy M.R. said—"The jurisdiction of the Divorce Court is purely statutory. It has existed for sixty years. It has many peculiar features. No judgment for divorce can be obtained by consent. Allegations by a petitioners, if not denied by the respondent, are not to be taken as true, as they would be in litigation in other Divisions of the High Court." In *Rutherford* v. *Rutherford* (4) at page 153, Lord Sterndale M.R. expressed himself thus— "..... the respondent did not appear, and, therefore, no evidence was called on his behalf. But it is hardly necessary to say that a divorce suit differs from an action at common law inasmuch as the failure to file an answer does not justify a decree being made without evidence, as the failure to put in an answer at common law might justify a judgment being entered by default." In (*Hyman* v. *Hyman*), (*Hughes* v. *Hughes*) (5), at P. 30. Scrutton, L.J., observed—"The Divorce Court is entrusted with a jurisdiction of national importance. The stability of the marriage tie, and the terms on which it should be dissolved, involve far wider considerations than the will or consent of the parties to the marriage. The Court does not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties; nor does it readily act on uncorroborated confessions", and, at page 75, Sankey L. J.—"Normally in suits coming before the Chancery or King's Bench judges, the Court is considering only the rights of the parties *inter se*. The Divorce Court is dealing with changes in the status of the parties, and considerations of public and national interest arise. In ordinary cases before a Chancery or King's Bench Court a defendant is at liberty to consent to judgment for the plaintiff with costs, no such liberty is permitted to a respondent in a divorce case, indeed, collusion is an absolute bar to a dissolution of marriage." And in *Russell* v. *Russell* (6), at page 736, Lord Sumner expressed himself in this way—"Decrees of dissolution of marriage are to be made only

(3) 1917 P.D. 64.
(4) 1922 P.D. 144.
(5) 1929 P.D. 1.
(6) 1924 A.C. 687.

upon strict proof. Consent to a decree, direct or indirect is inadmissible, nor is there any one present to make admissions, if the suit is undefended.." In Halsbury's Laws of England, Third Edition, Volume 12, at page 292, it is stated—"A decree must be refused, even if the suit is not defended where there is no jurisdiction to make it, or where the allegations put forward are not proved; for judgment by default, or by consent, or by admission, is unknown in matrimonial causes." It has been held in *Bat Kanku* v. *Shiva Toya* (7), *Alla Rakha* v. *Barkat Bibi* (8), and (*Robert John*) *Twiss* v. (*Lily Mary*) *Twiss* (9), that a decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence. The learned counsel for the appellant has referred to *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati* (10), a case under the Act, in which, at page 371, their Lordships observed——"Section 23 of the Act requires the court to be satisfied on certain matters before it is to pass a decree. The satisfaction of the Court is to be on the matter on record as it is on that matter that it has to conclude whether a certain fact has been proved or not. The satisfaction can be based on the admissions of the parties. It can be based on the evidence, oral or documentary, led in the case. The evidence may be direct or circumstantial." The last was a case of annulment of marriage under section 12(1) (d) of the Act, and all the other cases referred to above, are cases of decrees of divorce. Not one of those cases concerns a decree for restitution of conjugal rights. A decree of divorce by consent is on public policy and in public interest not accepted by law. Another matter that may be noted is that in all those cases the matter was considered by the learned Judges direct in appeal from a decree for divorce. Not one of them is a case in which the decree was challenged as nullity in subsequent proceedings after it had become final either because the appeal had failed or because the appeal had become barred by time. So apparently none of those cases really helps the argument on the side of the respondent on the facts of the present case.

The question then is, is the decree in the present case obtained on May 18, 1960, for restitution of conjugal rights by the appellant

(7) (1893) 17 Bom. 624.
(8) A.I.R. 1930 Lah. 771 (S.B.).
(9) A.I.R. 1933 Lah. 356(1) (S.B.).
(10) A.I.R. 1965 S.C. 364.

against the respondent a consent decree? It is only if it is first found to be a consent decree that the next matter for consideration can arise, whether, being a consent decree, it is a nullity or a void decree. The facts of this case as emerge from the material available on the record are that the parties appeared in Court on May 18, 1960, no written application of any kind was made to the Court by any party; and no request was made by any party to the Court that a decree by consent be made, as it was actually made. Sub-section (2) of section 23 of the Act says that "before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties." Thus to bring about a reconciliation between the parties is the first duty of the Court before it proceeds to try the matter of controversy on merits. The appellant had alleged in his petition withdrawal of the respondent from his society without reasonable excuse, and he had thus sought a decree for restitution of conjugal rights. The respondent did not deny that she was not living with the appellant, but said that she had been turned out by his cruelty. In their statements on May 18, 1960, in Court, the parties meant as much that they were not living together, in other words that the respondent was not in the society of the appellant. They were not prepared to concede the reason for this separation to each other. They, however, agreed to live together from that time onwards. This was not a request to the Court to pass a consent decree in favour of the appellant, but an act of reconciliation in the wake of the basic idea underlying sub-section (2) of section 23 of the Act. The learned trial Judge was faced with such a situation. If this situation had arisen in an English Court, then it would have been open to the respondent to apply by summons for an order to stay the proceedings on the ground that she was willing to resume the society of the appellant (Divorce Rule 26, see pages 212 and 1341 of Rayden on Divorce, Eighth Edition). It is, however, stated at pages 212 and 213 of the same book that "Procedure under this rule (Divorce Rule 26) will not be allowed to delay the hearing of the suit where it is apparent that there is an issue fit to be tried as to the *bona fides* at the respondent". If there was a similar rule as Divorce Rule 26 in England, in our rules, on the parties having shown a reconciliatory attitude to live together in future, the learned trial Judge could have had this course open to him to stay the proceedings and have

the result of the genuineness of the desire for reconciliation from the subsequent conduct of the parties. There is no such rule here. So the learned trial Judge had one of the two courses open to him. One course was to dismiss the petition of the appellant, leaving him to make a fresh petition should the reconciliatory attitude of the respondent have proved subsequently not *bona fide*, as it in fact happened in this case and the other course open to the learned trial Judge was to take a realistic view of the circumstances of the case and the reconciliatory attitude exhibited by the parties and to make a decree for restitution of conjugal rights so as to safeguard the husband (appellant) against any ruse by the wife (respondent) in obtaining dismissal of the petition by making a momentary statement that she was prepared to go and live with the appellant. The soundness and justness of the course adopted by the learned Judge has been shown by the subsequent conduct of the respondent in refusing to accompany the appellant immediately as she was out of the court-room after the decree had been made, and, thereafter, immediately as she was out of the court-room after making statement in the first execution application. At the time of the second execution application she came out blatantly to say that there was no question of her going with the appellant. The learned trial Judge was not to act as an automation in the situation as was created before him in consequence of the reconciliatory attitude of the parties. He was not to dismiss the petition merely because the parties had agreed to live together. He was to apply his mind to the case and satisfy himself whether it was a case fit for the grant of the decree or not. No doubt the judgment of the learned trial Judge is not perhaps couched in ideal language, but its substance is that he saw through what the respondent might come to after having obtained dismissal of the petition against her by making a reconciliatory statement. He was, therefore, sound in his approach, a soundness of judgment supported by subsequent events, in granting a decree for restitution of conjugal rights to the appellant as against the respondent in the circumstances. It is not, in my opinion, a decree by consent, as a consent decree for dissolution of marriage by divorce dealt with in the case already referred to, but it is a decree in consequence of reconciliation between the parties and in the wake of the reality of the situation presented to the learned Judge. As has been pointed out, in England one of the two courses would have been the result in such a situation, one, that it may have led to the stay of proceedings, and

the other, that if the *bona fide* of the respondent was not accepted, to the disposal of the petition on merits. The first type of proceedings are not available here and, in the circumstances of the present case, the learned trial Judge proceeded in a judicious manner in granting the decree after the parties showed reconciliation. So, in my opinion, this really is not a decree by consent as that has been understood in the cases already referred to, or as the same is understood in ordinary civil actions. It was a decree in consequence of reconciliation between the parties and a decree according to the terms of sections 9 and 23 of the Act, for the learned trial Judge was satisfied that, though the parties had shown a reconciliatory attitude and said that they were going to live together, it was his duty to do justice to see that the petition of the appellant was not defeated by the respondent by a statement to which she was not to hold on. She in fact decried the statement the very moment she was outside the court-room, then she did so in the first execution application having in Court agreed to go with the appellant, and, finally, at the time of the second execution application, she came out with a blatant and defiant statement that there was no question of her going with the appellant.

On the approach, as above, that the decree for restitution of conjugal rights made by Court on May 18, 1960, in this case was not strictly a consent decree; the two questions that Pandit J., and myself referred to a large Bench do not really arise in this case. Those questions could only arise if the conclusion reached was that the decree, granted in this case, was a consent decree of the type as a consent decree for divorce as dealt with and referred to in the cases already cited above. This, as I have already said, is not so. The decree is thus a perfectly valid decree. The question of it being void or a nullity does not arise. In these circumstances, I do not consider it necessary that I should go into the question that if there is a decree for restitution of conjugal rights by consent, whether it would be a valid or an invalid decree? In fact a question like that, whenever it should arise, will have to be considered, in my view, not merely by saying that such a decree is a consent decree, but by carefully watching the conduct of the parties and from that conduct seeing whether what they did was or was not collusive in view of section 23(1)(c) of the Act. The present is not a case under that provision. There is no evidence of collusion between the parties in obtaining the decree for restitution of conjugal rights in this

case. In fact they were not near each other when they came to Court on May 18, 1960. The husband on that day was taken in when he accepted the statement of the respondent that she was prepared to go with him and agreed to her reconciliatory attitude, and, immediately as they came out of the Court, she left him. In such a case to say that the decree is invalid is to permit a wife like the respondent to take an undue advantage of the provision, in regard to reconciliation, in sub-section (2) of section 23 of the Act. The conduct of the respondent from the very beginning shows that she never really intended reconciliation though she pretended the same. In the circumstances, as I have already said, the learned trial Judge was justified in not being taken in by such an attitude of the respondent and in making a decree for restitution of conjugal rights. So this is not a case in which the matter of collusion comes in and, indeed, no such allegation or averment has been made by any side.

In consequence, there is, in my opinion, no occasion to answer the two questions referred to the larger Bench in this case and, on the approach as above, the decree of the learned Single Judge is reversed and that of the learned trial Judge granting dissolution of marriage by divorce to the appellant from the respondent is affirmed. In the circumstances of this case, there is no order in regard to costs.

MAHAJAN, J.—I have had the advantage of reading the judgments prepared by my Lord, the Chief Justice. I am in agreement with him that the appeal should be allowed and the decision of the learned Single Judge set aside and that of the learned District Judge restored. But with due deference to my Lord, the Chief Justice, I beg to differ on the question, that the decree passed on 18th May, 1960 under section 9 of the Hindu Marriage Act was, in substance and in fact, not a consent-decree.

As I and my learned brother Pandit, J., agree that the decree in question is a consent-decree and as Pandit, J., is going to deal with this and the other matters, I refrain from dealing with the question of the decree being a consent-decree in order to avoid repetition. I would, however, like to record my views on the question whether such a decree is a nullity and cannot be ignored. I must confess that at one time, I held the view that such a decree in a Matrimonial cause would be a nullity. But after hearing the learned counsel for the parties, I must say that my

view was wrong. It is not possible for me to hold in view of the state of the Indian Law that such a decree is a nullity and can be attacked in collateral proceedings. Before proceeding to deal with this matter, some preliminary ground has to be cleared.

In India, only three types of jurisdictions exist—Civil, Criminal and Revenue—in which the civil laws, the criminal laws and the revenue laws are administered by Courts, civil, criminal or revenue. Besides, this, there are various other Authorities or Tribunals or Special Courts which deal with certain *quasi*-judicial matters; and sometimes when authorised by law, even with civil, criminal or revenue matters. But otherwise, there is a clear line of distinction running throughout that only there are three types of jurisdiction, civil, criminal and revenue unlike English Courts, where Matrimonial, Admirality, Eccelesiastical and Probate jurisdictions exist. Only in the case of the High Courts, this distinction has been brought in by the Letters Patent. If a reference is made to the Letters Patent of any High Court constituted before the Indian Independence Act, the position is this: So far as the Presidency High Courts are concerned, they exercise civil, criminal, admirality; vice-admirality testamentary; intestate and matrimonial jurisdictions, whereas the other High Court exercised all the said jurisdictions excepting admirality and vice-admirality. For instance, under the Indian Succession Act, certain types of cases, letters of administration or probate is granted by the District Court. It cannot be denied that the District Court when dealing with matters under the Indian Succession Act, is acting as a civil Court. For the regulation of procedure of these three types of jurisdiction, there are three enactments, namely, the Code of Civil Procedure, the Code of Criminal Procedure and the Land Revenue Act and the Tenancy Act. The preamble to the Code of Civil Procedure states that it has been enacted "to consolidate and amend the laws relating to the procedure of the Courts of civil judicature." Whenever the legislature confers power on the civil Courts to deal with a matter, it can be safely assumed that the matter, which the civil Courts have to decide, is of a civil nature. It is not uncommon for the legislature to legislate with regard to the civil matters and civil rights; and for the determination of disputes relating to those matters or rights to vest jurisdiction in the established civil Courts of the country. It is also helpless that at times the legislature takes away the jurisdiction in civil matters from the ordinary Courts of the country and vests the same either in Special Courts or Special Tribunals. But the rule is well-settled that all

civil matters have to be settled by the civil Courts unless their jurisdiction is taken away either expressly or by necessary implication. Whenever a question arises as to whether the Special Tribunals or Special Courts have remained within the bounds of their jurisdiction, it is the civil Courts alone which possesses the jurisdiction to determine the question. Wherever such authorities have overstepped their jurisdiction, the civil Courts have stepped in to declare their orders or actions invalid. The only Court which has the jurisdiction to decide whether a particular matter falls within its jurisdiction or not, is the civil Courts, unless the Statute creating a Special Court, Tribunal or Authority confers on the same the power to determine questions relating to its own jurisdiction. In this connection, reference may be made to the decision of the Supreme Court in *Bhatia Corporation* v. *D. C. Patel* (11).

It also happens that a jurisdiction generally exercised by the Civil Courts is sometimes taken away and is vested in a particular class of civil Courts. For instance, before the coming into force of the Hindu Marriage Act, suits for restitution of conjugal rights were entertained by the ordinary civil Courts constituted under the Punjab Courts Act. After the coming into force of the Hindu Succession Act, such suits are barred and only an application for that purpose lies and that too to the District Court. This will be clear from the decision of the Madhya Pradesh High Court in *Bootan Bai* v. *Durgaprasad Chatura* (12). This view was adopted by this Court in *Bharawn Bai w/o Lila Ram and others* v. *Lila Ram Sanwara Ram* (13). But that does not mean that when a District Court is entertaining an application, it is not acting as a civil Court. The nature of the proceedings for purpose of classification between the three types of jurisdiction, namely, civil, Criminal and revenue; is civil. The District Courts have been constituted under the Punjab Courts Act. These Courts have been constituted to deal with civil matters. There is no provision in the said Act which confers matrimonial jurisdiction, on them. As a matter of fact, under section 18 of the Punjab Courts Act, three classes of civil Courts have been constituted, namely, the

(11) 1953 S.C.R. 185.
(12) A.I.R. 1959 M.P. 410.
(13) A.I.R 1963 Punj. 118.

court of the District Judge; the Court of the Additional Judge and the Court of the Subordinate Judge. Section 24 of the Act provides that:—

> "This Court of the District Judge shall be deemed to be the District Court or Principal Civil Court of original jurisdiction in the District."

Section 25 confers original civil jurisdiction on District Judge in all suits. Under the Hindu Marriage Act, the petitions for restitution of conjugal rights, judicial separation, divorce etc., are to be filed in the District Courts, that is, in other words, in the principal civil Court. The procedure of trial in such applications is again the Code of Civil Procedure *vide* Section 21 of the Hindu Marriage Act, and to the extent its provisions do not come in conflict with the Hindu Marriage Act. It would also be worthwhile to refer section 19 of the Hindu Marriage Act which is under the head 'Jurisdiction and Procedure'. Section 19 reads thus:—

> "19. Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife resides or last resided together."

The words 'original civil jurisdiction' are pertinent. My object in referring to the various provisions of the Hindu Succession Act, the Hindu Marriage Act, the Punjab Courts Act and the Code of Civil Procedure has merely been to bring in the forefront, that all matters under the Hindu Marriage Act are matters of a civil nature and the jurisdiction to try them has been vested in the principal civil Court of original civil jurisdiction, that is the District Court.

Having cleared this ground, the next question that arises, is whether a consent-decree passed under the Hindu Marriage Act by the District Judge, properly seized of the matter, can be said to be a decree without jurisdiction ? See the following observations of Austosh Mukerjee, acting Chief Justice in *Hriday Nath Roy* v. *Ram Chandra Barna Sarma* (14) at page 35 of the report:—

> "In the order of Reference to a Full Bench in the case of *Sukhlal* v. *Tara Chand* (2), it was stated that jurisdiction may be

(14) A.I.R. 1921 Cal. 34=I.L.R. 48 Cal. 133

defined to be the power of a Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it; in other words, by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. An examination of the cases in the books discloses numerous attempts to define the term "jurisdiction," which has been stated to be "the power to hear and determine issues of law and fact," "the authority by which the judicial officers take cognizance of and decide causes", "the authority to hear and decide a legal controversy;" "the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them;" "the power to hear, determine and pronounce judgment on the issues before the Court;" "the power or authority which is conferred upon a Court by the legislature to hear and determine causes between parties and to carry the judgments into effect;" "the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution."

In *Smt. Ujjam Bai* v. *State of Uttar Pradesh and another* (15) at page 1929 of the report, S. K. Dass, J. observed as under:—

" 'Jurisdiction' means 'authority to decide'." The jurisdiction to entertain and decide a matter is either conferred by the Statute or by consent as in the case of arbitrations. Section 9 of the Hindu Marriage Act empowers the District Judge to entertain and decide an application for restitution of conjugal rights in accordance with the provisions of the Hindu Marriage Act. It cannot be denied that a proper application was presented under section 9; and the Court was properly seized of the matter. Thus it had the jurisdiction to decide that matter. It is also well known that a Court, which is seized of the matter, can pass decree with consent, unless the passing of such a decree is forbidden by law. Therefore, it has to be seen whether there is any provision in the Hindu Marriage Act which forbids a Court to pass a consent-decree. All that section 9 requires is that the Court must be satisfied of the truth of the statements made

(15) A.I.R. 1962 S.C. 1621.

in such petitions and that there is no legal bar to the grant of such an application. The legal bars in the Act are to be found in section 23, namely, that the petitioner is not, in any way; taking advantage of his or her own wrong or disability for the purposes of the relief sought; or that the petitioner has not, in any manner, been accessory to or connived at or condoned the act or acts complained of; or where the ground of petition is cruelty, the petitioner is not presented or prosecuted in collusion with the respondent; or there has been unnecessary and improper delay in instituting proceedings. Section 23 also provides that before granting the relief prayed for, it shall be the duty of the Court in the first instance in every case, where it is possible so to do consistent with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Besides these provisions, there is no specific provision in the Hindu Marriage Act which prohibits the passing of a consent-decree or declares that if such a decree is passed, it will be null and void.

It is not uncommon for Statutes to declare that if certain decree is passed against its provisions it will be null and void or that decree will be inexecutable. By way of an instance in this connection, reference may be made to the decision of the Supreme Court in *Haji Sk. Subhan* v. *Madhorao* (16). At page 1237, the following observations clearly bring out the point:—

> "The contention, that the Executing Court cannot question the decree and has to execute it as it stands, is correct, but this principle has no operation in the facts of the present case. The objection of the appellant is not with respect to the invalidity of the decree or with respect to the decree being wrong. His objection is based on the effect of the provisions of the Act which has deprived the respondent of his proprietary rights, including the right to recover possession over the land in suit and under whose provisions the respondent has obtained the right to remain in possession of it. In these circumstances, we are of opinion that the executing Court can refuse to execute the decree holding that it has become inexecutable on account of the change in law and its effect."

(16) A.I.R. 1962 S.C. 1230.

Again there are Statutes which render a validly passed decree inoperative where it is inconsistent with the provisions of a Statute; for instance, unsatisfied ejectment decree prior to the coming into force of the Rent Acts. There are certain transactions which the law declares void; for instance, a contract by a minor. It is not necessary to multiply instances. My only object is to show that there is no provision which renders a decree passed under section 9 of the Hindu Marriage Act, which is inconsistent with its provisions. a nullity. Of course, such a decree will be illegal. But there is a world of difference between a 'nullity' and an 'illegal' decree. A decree, which is a nullity, can be ignored. In fact, it does not exist in the eyes of law. But that is not the case with an illegal decree. That decree exists in the eyes of law till it is set aside by appropriate proceedings. As already observed, there is no provision in the Hindu Marriage Act, which renders a consent-decree void, in case one is passed under section 9. Even in the case of a consent-decree, the Court has to be satisfied about the truth of the statements made in the petition. I am not unmindful of the fact that there can be cases where the consent is collusive; and in that event, section 23 provides a legal bar to the passing of such a decree. But this provision does not go further and declares that in spite of it, if a decree is passed, it will be a nullity or that such a decree will be void. There can be cases where there is no collusion and the consent is *bona fide*. For instance, both sides have led evidence and thereafter make an application that the decree may be passed. In spite of the application, the Court will have to satisfy itself about the truth of the statements made in the application. And once the Court is satisfied, it can proceed to pass a decree on the basis of the consent of the parties. Therefore, it cannot be said as a matter of law that District Court cannot pass a consent-decree under the Hindu Marriage Act. As indicated above, a consent-decree can be passed under certain circumtances and it will depend on the facts and circumstances of each individual case whether such a decree is a good decree or not. This view finds support from the decision of the Supreme Court in *Mahendra Manilal Nanavati V. Sushila Mahendra Nanavati,* (10).

The further question still remains, whether a consent-decree, which is not in accordance with the provisions of the Hindu Marriage Act, can be said to be a decree wholly without jurisdiction and thus a nullity ? The decree may be illegal; or the Court may, while passing the decree, ignor the Statute. But it cannot be said rightaway that the Court lacked inherent jurisdiction to pass it. It is only in cases

where a Court lacks inherent jurisdiction that a decree passed by it is a nullity and not otherwise. Its wrong decision, where it is within its jurisdiction, cannot be ignored and has got to be vacated by appropriate legal proceedings, that is, by appeal; revision or a separate suit. Thus the questions ultimately will resolve to this. was the Court passing the consent-decree lacking the inherent jurisdiction to pass it ? Could the Court pass such a decree and if not; what will be the effect ? Whether there is any specific provision in the Hindu Marriage Act to declare a consent-decree to be a nullity?

There is a clear distinction running in the decided cases to which a reference will be made hereafter to the effect that a decree passed by a Court or a Tribunal lacking inherent jurisdiction would always be a nullity, whereas a decree passed by it in the exercise of its jurisdiction and against the provisions of the law, though illegal, would not be a nullity. A wrong decision of a Court within its jurisdiction cannot be ignored and has to be got vacated by appropriate legal proceedings. In many cases, where this distinction has been lost sight of, the Courts have erred in their ultimate conclusion. But if this distinction is kept in view, the chances of error are practically negligible. In *Haridev Nath Roy* v. *Ram Chandra Barna Sarma* (14), Sir Mookerjee, who presided over the Full Bench of that Court, while delivering the judgment, observed:—

> "The jurisdiction of the Court may have to be considered with reference to place, value and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to d eal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction: for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when

there is jurisdiction of the person and subject-matter. the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction, should be included in the conception of jurisdiction itself, is sometimes a questions of great nicety, as is illustrated by the decisions reviewed in the order of reference in *Sukhlal V. Tara Chand* (17) and *Khosh Mahomed V. Nazir Mahomed* (18), see also the observation of Lord Parket in *Raghunath V. Sundar Dass* (19). But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion. (See *Mabulla V. Hemangini* (20) and *Moser V. Marsden*, (21) where the term jurisdiction is used to denote the authority of the Court to make an order of a particular description.) We must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgement pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it. *Rashmoni V. Ganada* (22)

Since the jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition, deference may be made to the celebrated dictum of Lord Hobhouse in *Malkarjun V.*

(17) (1905) 33 Cal. 68.
(18) I.LIR. (1905) 33 Cal. 352.
(19) I.L.R. (1914) 42 Cal. 72.
(20) (1910) 11, C.L.J. 512.
(21) (1892) 1 Ch. 487.
(22) (1914) 20 C.L.J. 213.

Narhari (23). "A court has jurisdiction to decide wrong, as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that 'course is not taken, the decision, however wrong, cannot be disturbed.' Lord Hobhouse then added that though it was true that the Court made a sad mistake in following the procedure adopted, still in so doing the Court was exercising its jurisdiction; and to treat such an error as destroying the jurisdiction of the Court was calculated to introduce great confusion into the administration of the law. The view that jurisdiction is entirely independent of the manner of its exercise, and involves the power to decide either way upon the facts presented to the Court, is manifestly well-founded on principle, and has been recognised and applied elsewhere: *Ex parte Watkins* (24) and *Herran* v. *Dater* (25). There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this : the former is reversible by an Appellate Cohrt within a certain fixed time and is, therefore, only voidable; the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a Court had jurisdiction to render only correct decisions, then each time, it made an erroneous ruling or decision, the Court would be without jurisdiction and the ruling itself void. Such is not the law and it matters not what may be the particular question presented for adjudication,

(23) I.L.R. (1900) 25 Bom. 337=27 I.A. 216.
(24) (1887) 7 Peter 568.
(25) (1886) 120 U.S. 464.

whether it relates to the jurisdiction of the Court itself or affects substantive rights of the parties litigating, it cannot be held that the ruling or decision itself is without jurisdiction or is beyond the jurisdiction of the Court. The decicsion may be erroneous, but it cannot be held to be void for want of jurisdiction. A Court may have the right and power to determine the status of a thing and yet may exercise its authority erroneously; after jurisdiction attaches in any case, all that follows is exercise of jurisdiction, and continuance of jurisdiction is not dependent upon the ccorrectness of the determination. * *

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In *Central Potteries Ltd.* v. *State of Maharashtra and others* (26), it was observed as follows:—

"In this connection it should be remembered that there is a fundamental distinction between want of jurisdiction and irregular assumption of jurisdiction, and that whereas an order passed by an authority with respect to a matter over which it has no jurisdiction is a nullity and is open to collateral attack, an order passed by an authority which has jurisdiction over the matter, but has assumed it otherwise than in the mode prescribed by law, is not a nullity. It may be liable to be questioned in those very proceedings, but subject to that it is good; and not open to collateral attack. * * *"

To the same effect is the decision of the Privy Council in *Ledgard and another* v. *Bull* (27).

I now propose to refer to the decisions which illustrate the above principle. In *Hira Lal Patni* v. *Sri Kali Nath* (28), the question was whether the decree of the Bombay High Court, after leave to file suit had been obtained under Clause 12 of the Letters

(26) (1963) 1 S.C.R. 166.

(27) 12 I.A. 134.

(28) A.I.R. 1962 S.C. 199.

Patent, was without jurisdiction ? The objection in execution before the Allahabad High Court, when the decree was sought to be executed, was that the Bombay High Court had no territorial jurisdiction. This objection did not prevail. On appeal to the Supreme Court, the same objection was again agitated and it was rejected with the following observations:—

> "An objection to its territorial jurisdiction is one which does not go to the competence of the Court and, therefore, can be waived.

In *Ittyavira Mathi* v. *Varkey Varkey and another* (29), it was held that a decree passed in a suit, which was barred by time, though illegal was not a nullity. The following observations at page 910 of the report may be read with advantage:—

> "* * * Even assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and, therefore, the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. Learned counsel, however, referred us to the decision of the Privy Council in *Maqbul Ahmad* v. *Onkar Pratap Narain Singh* (30), and contended that since the court is bound under the

(29) A.I.R. 1964 S.C. 907.
(30) A.I.R. 1935 P.C. 85.

provisions of S. 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity. * * * *"

In *Abdul Majid & others* v. *Shamsherali Fakruddin* (31), it was held that it was necessary to obtain a succession certificate under section 214 before the moneys payable to the estate of the deceased can be recovered. A decree obtained without obtaining such a certificate was held to be a valid decree and not a nullity. The learned Chief Justice of the Bombay High Court in this connection made the following observations:—

"The provisions of S. 214 are no more peremptory than the provisions of S, 35, Stamp Act, or S. 49, Registration Act, which forbid the Court to receive certain documents in evidence. If the Court does, in breach of those provisions, improperly receive documents in evidence, that is an error which can be corrected in appeal, but it does not render the decree a nullity. In the same way the omission to obtain a succession certificate is good ground of appeal, but if the decree is not appealed from, it remains a valid decree and cannot be regarded as a nullity."

The following Head Note in *Askaran Baid* v. *Deolal Singh* (32), clearly illustrates the point:—

"Where the Court in seisin of the case which resulted in a compromise decree is properly in seisin of that case, the consent decree under S. 147-A cannot be regarded as a nullity

(31) A.I.R. 1940 Bom. 285.
(32) A.I.R. 1929 Patna 568 (F.B.).

on the ground that the formalities indicated in the section were not complied with. * * * *",

and so also the decision in *Ishan Chandra Bankiya* v. *Moomraj Khan* (33), *Radhar Mohan* v. *Mrs. Jane Hilt and another* (34); *Moolchand and others* v. *Maganlal* (35); and *Calcutta National Bank (in liquidation)* v. *Abhoy Singh Sahela and another* (36).

Thus it will be clear that in the absence of any provision in the Hindu Marriage Act rendering the consent-decree void, it cannot be held that such a decree is a nullity merely because it offends the provisions of section 23 of the Act. I have already given instances where peremptory provisions of the Statute were violated and yet the decrees were held not to be *non est*. Conceding that the present decree is against the provisions of section 23, it is not a nullity and has to be got vacated in appropriate proceedings. The Court passing the decree was competent to pass it. There was no want of jurisdiction.

The learned counsel for the respondent laid great stress on certain decisions under the East Punjab Urban Rent Restriction Act; and particularly on the decision of the Division Bench of Bedi and Pandit, JJ.; in *K. L. Bansal* v. *Kaushalya Devi* (37); wherein it was observed that the decree for eviction was a nullity and was not enforceable. This decision proceeded on the applicability of section 4(2) of the Act to section 13. Section 4(2) specifically renders any agreement for payment of rent in excess of the standard rent as null and void. On the other hand, decrees contrary to section 13 are not made void by operation of law but they are rendered inexecutable. The following words of section 13 are very pertinent:—

"** A tenant * * shall not be evicted * * in execution of a decree passed before or after the commencement of this Act * * except in accordance with the provisions of this Act. * * "

(33) A.I.R. 1926 Cal. 1101.

(34) A.I.R. 1945 All. 400.

(35) A.I.R. 1965 M.P. 75 (F.B.).

(36) A.I.R. 1959 Cal. 464.

(37) 1962 P.L.R. 1091.

Thus under section 13, eviction can only be ordered if its requirements are satisfied. This provision does not say that those decrees are null and void unlike section 4 (2) . With utmost respect to the learned Judges, it appears that no distinction was made between 'illegal' and 'void'. There is a world of difference between a 'void order' and an 'illegal order'. I have already indicated this with reference to the various decisions of the Supreme Court, Privy Council and other High Courts. Therefore, this decision and all other decisions taking a similar view under the Rent Act are not in point and do not help the contention of the learned counsel for the respondent.

The other decision, which the learned counsel for the respondent, has relied upon; is the one reported as *Smt. Alopbai* v. *Ramphal Kunjilal* (38). This decision again is no authority for the proposition that a consent-decree passed under section 9 is a nullity. Such a decree is merely an illegal decree if it does not satisfy the requirements of section 9 read with section 23 of the Act. And this is all that was held in this decision.

In fairness to the learned counsel for the respondent, it will be proper to set out his argument based on the Rent Restriction cases, that just as those decrees being contrary to the provisions of the Rent Act were held to be null and void, similarly the decree for restitution of conjugal rights, which is contrary to the statutory provisions of the Hindu Marriage Act, is necesarily void and a nullity. The decisions relied upon are :—

(1) *Ladha Ram* v. *Khushi Ram* (39);

(2) *Lekh Ram* v. *F. Chander Bhan Rajinder Parkash* (40);

(3) *Amar Nath* v. *Bagga Mal* (41);

(4) *Baij Nath* v. *F. Monga Lal Murari Lal* (42).

It is not necessary to deal with them individually. In all these decisions, where the expression 'nullity' has been used, excepting in the case of 'fair rent' cases, it has been used merely for the term illegality. The eviction decrees, as already pointed out, which are contrary to the Act, are not executable; but they are not void.

(38) A.I.R. 1962 M.P. 211.
(39) 1955 P.L.R. 188.
(40) 1962 P.L.R. 197.
(41) 1964 P.L.R. 347.
(42) 1966 P.L.R. 732.

After giving the entire matter my careful consideration, I am definitely of the view that a consent decree under section 9 of the Hindu Marriage Act cannot be held to be a 'nullity'. The Court, which entertained the application, was admittedly a competent Court to deal with it. This is not disputed. It dealt with it. But while dealing with it, may have gone wrong or done something which the law did not permit. That decree had to be vacated in accordance with law. It cannot be ignored. Only those decrees, which are wholly without jurisdiction or which the law declares null and void, can be ignored.

I have deliberately avoided going to the English Law because the provisions of that law are not *pari materia* with those of the Indian Law. Moreover, the decrees for restitution of conjugal rights were not uncommon to the Indian Law, and no case, prior to the coming into force of the Hindu Marriage Act, has been cited which would show that any consent-decree for restitution of conjugal rights was held to be void on that ground alone. The enactment of the Hindu Marriage Act has taken away that jurisdiction from the ordinary Courts of the land and has vested the same in the principal Court of Civil jurisdiction, namely, the District Court. It has also prescribed certain requirements which are a *sine qua non* before such a decree can be passed. And if such a decree is passed ignoring those prerequisites, it would undoubtedly be an illegal decree; but it is too much to say that it would be a null and void decree.

On principle also, I see no reason why a consent-decree cannot be passed. The object of such a decree is to bring the parties together. That is why, it is provided in the Statute that a Court should make an effort at reconciliation. The mere fact, that the disobedience of such a decree furnishes a ground for divorce, is wholly besides the point. The parties may be genuinely willing to live together and obey the decree at the time when the consent-decree was passed and, later on, circumstances may arise which lead to their breaking apart with the result that the disobedience of the decree follows. But that will not mean that the decree was obtained merely for the purpose of getting a divorce or merely for the purpose of fulfilling a formality. In each case, it has to be determined whether the consent is a genuine consent-decree or is merly a collusive consent-decree. If it is a collusive consent-decree, the Courts will not take into consideration for purposes of a petition for divorce. But otherwise, there is nothing which stands in the way of the same furnishing a ground for divorce.

As a matter of law, it cannot be ruled that merely because the decree under section 9 is a consent-decree, therefore, it necessarily is a collusive decree.

After giving the matter my careful consideration, I am clearly of the view that a valid consent-decree can be passed under section 9 of the Hindu Marriage Act and, in any case, even if my view is ultimately found to be erroneous, it cannot be held that such a consent-decree, if passed, is a nullity. At best, it will be an illegal decree which will have to be vacated in accordance with law. It will not be a decree which can just be ignored.

In the ultimate analysis, I agree with the order proposed by the learned Chief Justice.

PANDIT, J.—I have had the advantage of going through the judgment prepared by the learned Chief Justice and D. K. Mahajan, Whereas I agree with the conclusion arrived at by them that on merits, the decree of the learned Single Judge deserved to be reversed and that of the learned trial Judge, granting dissolution of marriage by divorce to the appellant, affirmed with no order as to costs, I am, however, I say so with great respect unable to persuade myself to agree with the learned Chief Justice that the decree passed under section 9 of the Hindu Marriage Act was not based on compromise between the parties and, consequently; not a consent decree. On this matter as well as the other question as to whether a consent decree for restitution of conjugal rights is a nullity or not, I wish to record my views.

The first question for decision is whether the decree, dated 18th May, 1960, for restitution of conjugal rights passed under section 9 of the Hindu Marriage Act, 1955, was a consent decree or not.

There is no dispute regarding facts. In January, 1960, Joginder Singh, moved a petition under sction 9 of the Act seeking restitution of conjugal rights. In the petition he made an allegation that his wife, Smt. Pushpa, had withdrawn from his society wihout any reasonable excuse. This petition was opposed by the wife and it was stated by her that she had left the house of her husband, because he had maltreated her. At the time of the framing of the issues, the parties appeared before the Court on 18th May, 1960, and made statements.

The husband said "I want to keep the respondent (wife) with me. I will never maltreat her in future, but it should not be taken that I have maltreated her. I am ready to settle her happily after forgetting all the previous matters. I promise before the Court that I will not maltreat her in future.' After that, the wife stated that she was prepared to go along with the petitioner (husband) who had turned her out of the house. She was ready to stay with him forgetting all the previous matters. On that very day, the Court before which the proceedings were pending, made an order under section 9 of the Act, the operative part of which read—"At the time of framing of the issues; the petitioner and the respondent made a statemene before the Court that they wanted to live together. The petitioner assured the Court as well as the respondent that he shall not maltreat the respondent. Both parties made a statement that they shall try to forget the past though they were not agreed as to whether the petitioner had been treating the respondent with cruelty or not. As such, in accordance with the statements of the parties the petition for restitution of conjugal rights is accepted. No order is made as to costs as the same were not pressed before me on behalf of the petitioner." A decree then followed in terms of this order of the learned Judge. From the statements of the parties recorded above, it would be clear that no allegation had been made by the husband in his statement that his wife had withdrawn from his society without any reasonable excuse. Similarly, the wife had also not admitted that she was guilty of such a charge. There was thus, no material before the Court on the basis of which, it could be satisfied that the wife had withdrawn from the society of her husband without reasonable cause. It is undisputed that no decree for restitution of conjugal rights could be passed, unless the Court was satisfied about the fact that the wife had withdrawn from the society of her husband without any reasonable cause. This satisfaction of the Court was a condition precedent for the passing of the decree. It is, therefore, obvious that, but for the compromise arrived at between the parties, the Court would not have passed a decree under section 9 of the Act. Secondly, even if it could be spelled out from the statements of the parties that the wife had left the house of her husband and withdrawn from his society, it is clear that she had done so, because, according to her, the husband had maltreated her. According to the statement of the husband on the other hand, he denied that fact and categorically stated that from the fact that he was ready to keep her in the house, it might not be inferred that he had maltreated her in the past.

Even in the order passed by the Court, after the recording of the statements of the parties, it was stated that the parties were not agreed as to whether the husband had been treating his wife with cruelty or not. Under these circumstances, if no compromise had been effected, the Court had to determine this disputed question of fact as to whether the husband had maltreated his wife or not and on the decision of that question would have depended the further finding as to whether the wife had withdrawn from the society of the husband with or without reasonable cause On the present material. the Court could not be satisfied one way or the other about the disputed question of fact and without determining that precise matter, a decree under section 9 could not have been passed. It, therefore, follows that it was on the basis of a compromise that had been effected between the parties that a decree under section 9 was made. It is specifically mentioned in the order that it was in accordance with the statements of the parties that the petition for restitution of conjugal rights was being accepted. Thirdly, on the statements of the parties alone, without taking into consideration the compromise that had been effected between them, the petition for restitution of conjugal rights would have been dismissed as infructuous. The husband wanted his wife to come back to his house and the wife had agreed to go back. This is clear from the statements recorded. That being so, the husband's petition under section 9 had become infructuous and it should have been dismissed on that ground. It was again on account of the compromise between the parties that even after making such statements, a decree under section 9 was passed by the learned Judge. Fourthly, in the decision of the Court, it was mentioned that no order as to costs was made, as the same were not pressed before it on behalf of the husband. This is an additional argument in support of the fact that the parties must have agreed regarding the award of costs as well. Fifthly, in the present litigation relating to divorce proceedings on the basis of the non-satisfaction by the wife of the decree under section 9 passed against her, it was mentioned by the learned District Judge in his judgment, dated 6th of June, 1963, that the husband's application under section 9 of the Act seeking restitution of conjugal rights had ended in a compromise decree, dated 18th May, 1960, in his favour. This statement was never challenged by the husband; when the matter went in appeal before the learned Single Judge, Sixthly, the learned Single Judge, also in his order, had mentioned that a consent decree on a compromise was passed on the 18th of May, 1960, by which a

decree for restitution of conjugal rights was granted to Joginder Singh. This statement was also not challenged by the husband in the grounds of his Letters Patent Appeal. On the other hand, his position in ground No. 9 of the appeal was that the view of the learned Single Judge, that there was considerable doubt in his mind whether a decree for restitution of conjugal rights could be granted by consent appeared to be wrong as it was not warranted by law. Seventhly, when the Letters Patent Appeal was heard by the Division Bench and the questions of law had been referred to the Full Bench, in referring order of the learned Chief Justice, it was mentioned that the real question of law that was involved in the case was : *can a consent decree for restitution of conjugal rights* be passed under section 9 of Act 25 of 1955 and if passed, is such a decree a valid decree or is such a decree not a nullity ? If it was not a consent decree, the question of referring to the Full Bench this question of law would not have arisen. Eighthly, when the intention of the parties is clear from the statements made by them, it is not left to this Court to decide as to what their real intention was at the time when the decree under section 9 was passed. The position is that right up to the stage of the decision given by the learned Single Judge neither the parties nor their counsel ever thought that a decree on the basis of consent could not be passed under section 9 of the Act. As a matter of fact, they were of the view that such a decree was quite valid in law. That is why, nobody disputed this point and everybody was agreed that the said decree was based on compromise. It is precisely for that very reason that a compromise was effected between the parties to shorten the litigation. It was only the learned Single Judge, who observed that it was extremely doubtful whether a decree, on the basis of consent, could be passed under section 9 of the Act. If the parties were to make statements now, I have not the least doubt that the husband would come forth with the plea that the decree under section 9 was not based on a compromise and would also try to explain away his previous statement. But, unfortunately for him, he cannot get that opportunity at this stage and we are left with his previous statement which in fact represented his real intention. From that statement, it is quite evident that the said decree was based on compromise. Ninthly, when the evidence of the parties was recorded in the present case relating to divorce, both of them stated on solemn affirmation that mise. If both the husband and wife had stated on oath that the said the decree of restitution of conjugal rights was based on a compro-

decree was based on compromise, it is not understandable how this Court is called upon to pronounce that the said decree was not based on a compromise. Whether a certain decree was based on a compromise is primarily one of fact and if the parties to the litigation are not at issue on that particular point, in my view, the Court is not competent to go into that matter and say that the said decree was not based on a compromise. The function of the Court is to give decision on a disputed question of fact. But when both the parties are agreed about a particular fact, the Court cannot take upon itself to say, in the first instance, that there is such a dispute and then proceeded to settle it. It was contended by the learned counsel for the petitioner that the statements of the parties in the present divorce proceedings should be ruled out of consideration under the provisions of section 92 of Evidence Act. The said section has nothing to do with the point in dispute. In the application under section 9, the statements of the parties were recorded and thereafter the Court passed the order after which a decree followed. The present statements made by the parties in the divorce proceedings do not in any way contradict, vary, add to or subtract from their earlier statements or from the order or decree of the Court passed thereafter. In the present statements, nothing is being said by the parties to contradict, vary, add to or subtract from their previous statements, Both the parties are agreed that the said decree was based on a compromise. At the utmost what could be said was that they merely explained that the earlier decree was passed on the basis of a compromise.

It was suggested on behalf of the appellant that the parties, in the instant case, did not jointly make a request in writing to the Court that a decree for restitution of conjugal rights be passed.

All that is needed is that the parties should settle their differences and make statements before the Court. It is then for the Court to act on those statements and pass a decree on their basis. This was precisely what was done in the instant case. In the order that followed, it was specifically mentioned that the petition for restitution of conjugal rights was accepted in accordance with the statements of the parties. In the decree also that followed that order, the same thing was repeated. That clearly shows that but for the statements of the parties, the petition under section 9 would not have been granted, unless, of course, the husband had been able to prove, by reliable evidence that the respondent had withdrawn from his society without any reasonable excuse and,

admittedly, no such evidence had been adduced by him, so much so that even the issues had not been framed in the case.

It was then argued by the appellant that the statements made by the parties were the result of the efforts of reconciliation having been made by the Court under the provisions of section 23(2) of the Hindu Marriage Act. The court did its duty in trying to bring the parties together and as it had succeeded in doing so, the parties, as a consequence, made those statements. The decree that followed, according to the learned counsel, was thus not based on any consent, but was the outcome of the efforts of reconciliation.

This contention has also no merit. If the suggestion is that the Court succeeded in reconciling the parties in bringing them together and persuading the wife to go and live with her husband, then the only proper course for the Court was to dismiss the petition for restitution of conjugal rights as having become infructuous, because the wife had agreed to go back to the husband and that is what he wanted. If, on the other hand, the result of the efforts of reconciliation on behalf of the Court was that a decree for restitution of conjugal rights be passed, then obviously since the wife agreed to such a course, the said decree was based on consent, because otherwise in law, a decree under section 9 could not have been made, unless the Court was satisfied, on evidence, that the wife had withdrawn from the society of her husband without any reasonable excuse and such evidence was, admittedly, not produced before the Court. The object of sub-section (2) of section 23 is not that if the Court is successful in reconciling both the parties, then it is bound to pass a decree under the Act. The idea of reconciliation is that the parties should not break their home. It obviously could not be the intention of the legislature that the reconciliation should result in a decree which, if not satisfied, might further end in proceedings for divorce. Reconciliation naturally does not mean that one of the parties should be provided with a handle for starting divorce proceedings which might end in breaking the matrimonial home.

In England, if such a situation, as in the instant case, had arisen, two courses were open to the Courts to deal with the matter. After reconciliation, either the proceedings would have been stayed at the instance of the wife or else if the Court was not satisfied that the wife really wanted to go back to the husband, the husband's petition would have been tried on merits. In India, the procedure for staying

the proceedings is not there. Either the petition in such circumstances would have been dismissed as having become infructuous or the matter would have been tried on merits. In the present case, the petition was neither dismissed as infructuous nor was the controversy between the parties tried on merits. If a decree has followed, in such a situation as was the case in hand, there is no other conclusion possible except this that the said decree was based on the consent of the parties. The Court could not otherwise make such a decree, unless the husband had produced evidence on the basis of which the Court could have been satisfied that the wife had withdrawn from the society of her spouse without any reasonable excuse. As I have already said no such evidence was adduced in the instant case and the Court was not competent to pass the said decree. If the Court knew that under the law, a decree under section 9 could not be passed on the basis of a compromise between the parties it would have framed issues and tried the case on merits, because there was no other course open for it except to satisfy itself about the existence of the ground mentioned in section 9 and then pass a decree if it was so satisfied. If the Court, at that time, did not believe that the wife was genuinely interested in going back to the husband, it would not have passed the decree, but would have resolved the controversy on merits. Like-wise the husband, in such a situation, would also have immediately come forward saying that he did not believe a word of what the wife was saying and would have further stated that she was merely wanting to get his petition dismissed and would have insisted on the trial of the dispute on merits. The Court, it appears, was under the impression, rightly or wrongly, that a decree for restitution of conjugal rights had to be passed when the parties had agreed to such a course and it actually did make such a decree, without having satisfied itself about the ground mentioned in section 9 for passing such a decree. If it knew at that time that a decree for restitution of conjugal rights could not be passed on the basis of a compromise between the parties, he would have insisted on the trial of the petition on merits and then passed a decree and that also if it was satisfied about the ground mentioned in section 9, otherwise it would have dismissed the petition. It could not be said that the trial Judge passed the decree for restitution of conjugal rights in the instant case, because he did not believe that the intention of the wife to go back and live with her husband was genuine. If that had been so, he would have tried the husband's petition under section 9 on merits.

In view of what I have said above, I have not the least hesitation in holding that the decree dated 18.5.1960 was a consent decree.

Having held that the said decree was a consent decree, the next question that requires consideration is whether such a decree is a nullity or not. If it is a nullity, then it will be taken as if it does not exist in the eye of law and it can be completely ignored. In that contingency, it could not form the basis of divorce proceedings on the ground that it had not been complied with within a period of two years from the date on which it was passed. The Letters Patent Appeal in that case would have to be dismissed, because the husband would not be able to get a decree of divorce on its strength.

When does a decree passed by a Court become a nullity? This is the point which needs decision. In Whatton's Law Lexicon, the word 'nullity' has been defined as "a thing which is null and void; an error in litigation which is incurable." According to Concise Oxford Dictionary, 'nullity' means "nothingness; a mere nothing, a non-entity." Undoubtedly, a thing which is a nullity will be treated as *non est* and having no existence in the eye of law. A decree, in my opinion, become a nullity if either the statute under which it is passed expressly declares that such a decree cannot be made and if made, it will be treated as a nullity or the Court, in which the proceedings had been taken which ultimately resulted in that decree, had no jurisdiction to try that matter. It is undisputed that in the Hindu Marriage Act, 1955 (hereinafter called the Act) under the provisions of which a petition for restitution of conjugal rights is made, it is nowhere laid down that a decree for restitution of conjugal rights cannot be passed on the consent of the parties and if so passed, it becomes a nullity. Therefore, one thing is clear that the statute, under which such decrees are made, does not prescribe that a consent decree of this kind is a nullity. Such a decree therefore, is not expressly declared to be a nullity by the statute. Learned counsel for the respondent did not bring to our notice any other statute whereunder such a decree had been declared a nullity.

Now, what do we mean when we say that a court has no jurisdiction to try a matter? This question has been answered by Sir Asutosh Mookerjee in a Full Bench decision of the Calcutta High Court in *Hriday Nath Roy* v. *Ram Chandra Barma Sarma* (14), where it was observed:—

> "The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when

there is jurisdiction of the person and the subject matter, the decision of all other questions arising in the case is but an exercise of that Jurisdiction."

Jurisdiction merely means authority to decide. Had the Subordinate Judge, who passed the decree, authority to decide the petition for restitution of conjugal rights made under section 9 before him? According to section 19 of the Act, every petition under the Act was to be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnised or the husband or wife resided or last resided together. "District Court" has been defined in section 3(b) of the Act. It means "in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act". The learned Judge, who was dealing with that petition, had been empowered by the State Government to deal with all the matters dealt with under the Act. Indisputably, therefore, he had the authority to decide the matter and he had the necessary jurisdiction.

Learned counsel for the respondent submitted that the Subordinate Judge had no jurisdiction to pass a consent decree under section 9 of the Act. According to section 9, when either the husband or the wife had without reasonable excuse, withdrawn from the society of the other, the aggrieved party could apply, by petition, for restitution of conjugal rights, and the court on being satisfied of the truth of the statements made in such petition and that there was no legal ground why the application should not be granted could decree restitution of conjugal rights. According to the learned counsel, before the Court could grant a decree under section 9, it had to be satisfied that the wife in the instant case, had withdrawn from the society of the husband without reasonable excuse. No such evidence had been produced by the husband and, therefore, there was no basis on which the learned Judge could have been so satisfied. His satisfaction with regard to the truth of the statements made in the petition filed by the husband, was a condition precedent for passing the decree. Then again under section 23 of the Act, the Court had to be satisfied that any of the grounds for granting relief existed and further that the petition was not presented

or prosecuted in collusion with the respondent and then and in such a case, but not otherwise, the court could pass a decree. In the instant case, according to the learned counsel there was absolutely no material before the learned Judge on the basis of which he could be satisfied that the wife had withdrawn from the society of the husband without reasonable excuse and that any of the grounds for the granting of the decree for restitution of conjugal rights existed. On the other hand, there was evidence before the court on which it could be said that the petition under section 9 of the Act was being prosecuted in collusion with the wife. Under these circumstances, according to the learned counsel, the Subordinate Judge had no jurisdiction to pass the decree for restitution for conjugal rights.

Learned counsel for the respondent, in my view, is confusing the lack of jurisdiction of a court to deal with a matter with the erroneous exercise of that jurisdiction. If a court has either mis-interpreted or mis-construed certain provisions of the Act or has ignored them or not complied with them before passing a decree, all that could be said was that he had not properly exercised the jurisdiction vested in him and thus given an erroneous decision in the case. It could not, however, be said that he had no jurisdiction to deal with the case. A court, as is often said, can decide rightly as well as wrongly but if its decision is wrong, it cannot be held that the court lacked inherent jurisdiction to deal with that matter. In this connection, Sir Asutosh Mookerjee in *Hriday Nath Roy's* case has again observed:—

> "Jurisdiction is the power to hear and determine and it does not depend upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly."

Even assuming that the centention of the learned counsel for the respondent was correct that no decree of restitution of conjugal rights could be passed on the basis of consent of both the parties, and that there was no material on the record in the instant case on which the court could be satisfied that the wife had withdrawn from the society of her husband without reasonable excuse and further that the petition under section 9 was being prosecuted with

the collusion of the wife, it could not, in my opinion, be said that the decree ultimately passed in the case was without jurisdiction and, therefore, a nullity. It could, at the most, be held that the decree was erroneous or contrary to law. If that was so; it could be set aside by taking appropriate proceedings by way of appeal under section 28 of the Act or by a separate suit if one is competent under the law. If no action was taken, that decree though erroneous, had become final between the parties. Such a decree would be considered to be valid for all purposes. It is capable of execution and the executing court would not be able to go behind it. It can be set up as a defence in a subsequent suit. It can form the basis of another suit or proceeding if certain rights flow therefrom. But it cannot be challenged or reversed in collateral proceedings. A decree which is void or which is a nullity, on the other hand, could be completely ignored, as if it never existed and it could be challenged even in collateral proceedings.

The Supreme Court in *Kiran Singh and others* v. *Chaman Paswan and others* (43), observed that it was a fundamental principle that a decree passed by a court without jurisdiction was a nullity and that its invalidity could be set up whenever and wherever it was sought to be endorsed or relied upon even at the stage of execution or even in collateral proceedings.

Shamsher Bahadur J., and myself had, on an earlier occasion, to deal with a somewhat similar problem in *Shri Amar Sarjit Singh* v. *The State of Punjab and others* (44). The following observations in that judgment prepared by Shamsher Bahadur, J. could be quoted with advantage:—

> "The learned Advocate-General, on behalf of the State, has submitted that the power to decide a matter carried with it the right of deciding both rightly or wrongly. It is only the absence of jurisdiction vested in an authority that makes an order passed by it a nullity. If an authority has a power to pass an order and passes wrongly, it has only erred in the exercise of its undoubted power and

(43) A.I.R. 1954 S.C. 340.

(44) C.W. 575 of 1966 decided on 3rd November, 1967.

the wrong or erroneous decision is only reversible at the instance of the appellate or revisional authority ..... The Advocate-General in his submission has sought the support of the Full Bench decision of the Calcutta High Court in *Hriday Nath Roy* v. *Ram Chandra* (14), wherein the leading judgment of Sir Asutosh Mookerjee, Acting Chief Justice, the following psssage of the judgment of Lord Hobhouse in *Malkarjun* v. *Narhari* (23) was approved:—

"A court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however, wrong, cannot be disturbed."

As put by Sir Asutosh Mookerjee, "jurisdiction is the power to hear and determine, and it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carried with it the power to decide wrongly as well as rightly". As observed by the learned Judge, "we must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination." The jurisdiction, according to the Full Bench decision, may have to be considered with reference to place, value and nature of the subject-matter, and the power of a tribunal may be exercised within defined territorial limits. The gist of the matter, as observed by Sir Asutosh Mookerjee, is that "the authority to decide a cause at all and not the decision rendered therein is what makes jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction." The existence or the continuance of jurisdiction is not dependent upon the correctness of the determination .....

In *Ujjam Bai* v. *State of Uttar Pradesh* (15), the Supreme Court through Mr. Justice S. K. Das, observed:—

"Jurisdiction means authority to decide whenever a judicial or quasi-judicial tribunal is empowered or required to

enquire into a question of law or fact for the purpose of giving a decison on it its findings thereon cannot be impeached collaterally or on an application for *certiorari* but are binding until reversed on appeal ..... The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature and it is determinable at the commencement, not at the conclusion; of the inquiry."

Giving instances of the absence of jurisdiction it was stated by the Supreme Court at page 1629 that :

"A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. has jurisdiction) to determine."

"A similar principle was enunciated in an earlier Supreme Court decision in *Ebrahim Aboobakar* v. *Custodian General* (45), where Chief Justice Mahajan, speaking for the Court, said:—

"Want of jurisdiction may arise from the nature of the subject-matter so that the inferior court might not have authority to enter on the inquiry or upon some part of it ..... But once it is held that the court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as a court has jurisdiction to decide rightly as well as wrongly."

Even when a question which falls within the powers of a tribunal is decided wrongly, it becomes binding on the principle of constructive *res judicata*. In other words, a wrong decision given on a question which the tribunal undoubtedly has the power to determine is not a question which is at large or open for determination for all times."

(45) A.I.R. 195 S.C. 319.

In view of what I have said above, I would hold that a consent decree for restitution of conjugal rights passed under the Act, would not be a nullity and when the same has become final between the parties, it can form the basis of divorce proceedings.

I want to make it clear that in the present case it is unnecessary for me to decide as to whether a court is competent to pass a consent decree in a matrimonial cause under the Hindu Marriage Act and whether such a decree, if passed, would be erroneous and contrary to law or not. For answering the question whether a consent decree was nullity or not, I have assumed that a decree of that kind could not be passed under the Act.

It may be stated that during the course of his arguments, learned counsel for the respondent also made a reference to a Bench decision of this Court to which I was a party in *Shri K. L. Bansal* v. *Shrimati Kaushalya Devi and others* (37), where it was held that before a valid decree for ejectment was passed against a tenant, the satisfaction of the court as to the existence of one or the other ground mentioned under section 13 of the Delhi and Ajmer Rent Control Act, 1952, was essential and further that an ejectment decree passed only on the statement of parties without the Rent Controller satisfying himself on merits, was contrary to the statutory provisions of the Act and was a nullity. In that case, the main judgment was prepared by Bedi, J. and while agreeing with my learned brother that the revision petition should be accepted, I had added a few words and towards the end, I had stated that the decree for eviction was, consequently, a nullity and was not enforceable. I must confess that the word 'nullity' therein, had been used by me rather loosely or inadvertently and the only justification for doing so, which I could now give, was that the precise matter, as to whether the decree in that case was a nullity or merely erroneous and contrary to law, was perhaps not debated before us. It would be apparent from the judgment of Bedi, J. that the respondents' counsel in that case had raised a contention that if it be held that the decree was defective and a nullity, it could have been challenged in appeal and not in execution proceedings. After giving certain facts, the learned Judge, however, had held that the respondents were estopped from raising the above objection, because they could not blow hot and cold in the same

breath. In the circumstances of that case, I should have held that the decree was erroneous and contrary to law and not a nullity and it could be executed. I may also point out that in a latter decision in *Amar Nath* v. *Bagga Mal* (41), where the same point was involved, though I had followed the Bench decision in K. L. Bansal's case and held the decree to be a nullity, but while determining the next question, namely whether such an objection could be taken in the executing court or a separate suit had to be filed for that purpose, I observed:—

> "It is undisputed that an Executing Court cannot go behind the decree and is bound to execute it. It cannot refuse to do so, because either the decree is against law or contravenes the provisions of any statute. The only exception to this rule is that when the decree is passed by Court, which had no jurisdiction to pass it by reason of the inherent defect of jurisdiction in the court passing it, the Executing Court can ignore it (see in this connection Full Bench decision in *Pirji Safdar Ali* V. *The Ideal Bank Ltd.* (46). The Supreme Court in *Kiran Singh* v. *Chaman Paswan* (43), has observed thus --It is a fundamental principle that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

> "The present case is not covered by the exceptions in the above-mentioned authority, because the Court had jurisdiction to pass the decree."

This would show that I was of the view that such a decree could not be ignored by the executing court as the court which passed the decree had jurisdiction to do so.

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(46) A.I.R. 1949 E.P. 94.

With these observations, I agree that the appeal be accepted, the decree of the learned Single Judge reversed and that of the trial Judge restored, but with no order as to costs.

ORDER OF THE COURT

In view of the majority decision, it is held that if a consent decree for restitution of conjugal rights under section 9 of the Hindu Marriage Act, 1955; is passed; it will not be a nullity. If it is not challenged in appeal or by way of other remedy available under the law and becomes final, it cannot be ignored and can form the basis of divorce proceedings under section 13 of the Hindu Marriage Act, 1955.

It is, however, unanimously decided that this appeal be accepted, the decree of the learned Single Judge reversed and that of the trial Judge granting dissolution of marriage by divorce restored, but with no order as to costs.

K.S.K.

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